In the High Court of Kerala at Ernakulam

Present:

The Hon'ble Mr.Justice K. Sukumaran.

Wednesday, 3rd March, 1982/12th Phalguna, 1903.

S.A.Nos.11 & 28 of 1980

and

C.M.P.No.3360 of 1978

....

S.A.No.11 of 1980.

(A.S.No.7 of 1977 of the District Court, Mavelikara)

(O.S.No.167 of 1975 of the Munsiff's court, Mavelikara)

...

Appellants/Appellants 1 & 2 and Defendants 2 and 3/

Defendants 1 to 4.

1. Geevarghese Samuel of Kalecckal, Kuttamperoor Muri, Mannar village.
2. Samuel Susamma of do. do.
3. Geevarghese Thenkamma of do. do.
4. Geevarghese John of do. do.

By Advs.M/s.A.C.John and George Varghese.

Respondent/Respondent/Plaintiff:

Kesava Pillai Arisnan Pillai of Devisadanam from Kollelivadakkethil, Kuttamperoor Muri, Mannar village.

(died.L.R.additional R2)

Addl.R2. Chellamma Anandavalli Amma of Devisadanam from Kollelivadakkethil, Kuttamperoor Muri, Mannar village.

The legal representative of the deceased sole respondent is impleaded as additional 2nd respondent as per order dt. 3-8-1981 on C.M.P.1906/81.

By Advs.M/s.A.G.P.Panicker & T.B.Mohan Kumar.

S.A.No.28/80

(A.S.11 of 1977 of the Addl.District Court, Mavelikara)

(O.S.172 of 1975 of the Munsiff's court, Mavelikara)

...

Appellants/Appellants/Plaintiffs:

1. Geevarghese Samuel of Kalecckal, Kuttamperoor Muri, Mannar village.
2. Samuel Soosamma of do.

3. Geevarghese Thankamma of do.
4. Geevarghese John of do. do.

By Advs.M/s.K.C.John, George Varghese & K.K.John

Respondents/Respondents/Defendants:

1. Kesava Pillai Krishna Pillai of Devisadanam, do. Muri, do. village (died)
2. Chellamma Anandavallianma of do.
3. Geevarghese Philipose of Puthuppalli of do.
4. K.K.Gopala Pillai of Sankaramangalathu, Kurattikkat Muri, Kannar village.

~~By~~ ~~xx~~

Second respondent is recorded as the legal representative of the deceased first respondent at the risk of appellants as per order dt. 3-2-81 on memo C.F.505/81 dated 29-1-1981.

By Advs.M/s.P.G.P.Panicker,K.S.Radhakrishnan, K.S.Balakrishnan & P.B.Mohan Kumar.

C.R.P.No.3360/76-J

(E.P.No.209/77 in O.S.No.167/75 of the Munsiff's court, Mavelikkara)

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Petitioner/decree holder/plaintiff:

Kesava Pillai Krishna Pillai of Devesadanathil from Kollalivadakkethil,Kuttamperoor Muri, Kannar village. (died) Legal representatives impleaded.

Addl.P2. Chellamma Anandavalli Amma of Devesadanathil from Kollalivadakkethil, Kuttamperoor Muri, Kannar village.

Addl.P2. is impleaded as the legal representative of deceased 1st petitioner vide order dated 17-12-1981 on CMP.1832/81.

By Advs.M/s.P.G.P.Panicker,K.S.Balakrishnan & K.S.Radhakrishnan.

Respondents/Judgment debtors/Defendants:

1. Geevarghese Samuel of Kaleeckal Veettil,Kuttamperoor Muri, Kannar village.
2. Sosamma of do. do. (corrected)

The cause title of the 2nd respondent is corrected as Soosamma instead of Sosamma as per the order dated 9-8-1979 on CMP.10865/79.

3. Geevarghese Thankamma of do.

4. Geevarghese John of do. do.

By Adv.Sri.K.C.John.

These second appeals and C.R.P. having ~~xxxxxxxxx~~ xxxxxxxxx been heard on 3-9-1962, the court on the same day delivered the following:

(Sukumaran, J.

S.A. Nos.11 and 28 of 1980
&
C.R.P. No. 3360 of 1978.

JUDGMENT.

S.A. Nos.11 and 28 of 1980.

These appeals can be disposed of together. S.A. No.11 of 1980 arises out of O.S.No.167 of 1975 and of the Munsiff's Court, Mavelikara, and S.A.No.28 of 1980 from O.S.No.172 of 1975. These suits were tried together. Defendants Nos.1 to 4 in O.S.No.167 of 1975 are the plaintiffs in O.S.No.172 of 1975. Apart from the plaintiff in O.S.No.167 of 1975 three other persons had also joined as defendants in O.S.No.172 of 1975.

2. O.S.No.167 of 1975 was filed for a permanent injunction restraining the defendants from trespassing into the property and constructing a 'thodu'. The defendants therein contended that there was a 'thodu' and that the 'thodu' was used from time immemorial for draining the water from the property and that they had acquired an easement in respect thereof.

3. O.S.No.172 of 1975 was filed for a declaration of the easement right in respect of the 'thodu' and for injunction restraining the defendants therein who were the plaintiff and others in O.S.No.167 of 1975, from obstructing the flow of the water from the 'thodu'.

4. The trial court decreed O.S.No.167 of 1975 and dismissed O.S.No.172 of 1975. After a very elaborate consideration of the evidence in the case, and the incidence which started from the filing of a petition before the Revenue Divisional Officer, the police action therein and other facts, the trial court entered a finding that the defendants have failed to prove that they had a right of easement for the plaint schedule property. The trial court was particularly impressed by the evidence of P.Ws.2 and 4. P.W.4 was having some land to the north of the plaint property. He clearly testified to the fact that there was no water channel as alleged by the defendants. He was aged 73 when he gave evidence. The trial court also noted that there was no case that the 'thodu' in question was a public water channel. Thus, on a consideration of the entire evidence the claim set up by the defendants therein was found to be without any basis whatever.

5. In the light of the above finding, the suit O.S .No.172 of 1975 was dismissed. The lower appellate court posed the point for decision as whether the defendants in O.S.No.167 of 1975 and the plaintiffs in O.S.No.172 of 1975 were entitled to a declaration of easement in respect of the 'thodu'. The requirements for an acquisition of easement had been explained by the lower appellate court in paragraph 7 of its judgment. After adverting to the pleadings in the case the court below observed:

> "From these averments it is clear that the right of draining out water is not claimed to have been exercised by the appellants with the consciousness that their user was curtailing ownership right of the respondent in any property."

It further noted that the averments in the plaint in O.S .No.172 of 1975 do not specify who is the owner of the servient tenement whose rights were curtailed by the user claimed by the appellants. The oral evidence in the case was thereafter considered. The rejection of the evidence of the defendants in O.S .No.167 of 1975 was characterised by the court below in the following words:

> "The lower court has rightly discarded the evidence of this witness. Thus there is no acceptable evidence to prove that the appellants and their predecessor-

-in-interest had been using the thodu continuously for the statutory period to drain water from the appellant's property."

6. In respect of the concurrent findings of fact so entered by the courts below on the appreciation of evidence in the case, it cannot be said that there has been any erroneous approach or misdirection relating to the legal principles. The appreciation of the evidence is also proper and correct. Having regard to these circumstances, there is little scope for interfering with the concurrent findings entered by the courts below, in the Second Appeal filed before this court.

7. Counsel for the appellants stressed that as regards the suit O.S.No.167 of 1975 the plaintiff was obliged to prove his title and possession. That Apart from producing the tax receipt there was no documentary evidence indicative of the title of the plaintiff therein and of the possession of the property. Consequently, according to the counsel, a relief by way of injunction could not be granted to the plaintiff, even if it be that O.S.No.172 of 1975 is dismissed on the ground that an easement has not been established as required

by law. It may at first sight appear to be an attractive argument. However, the courts below could not be found fault with, in the approach they made to the questions in the two suits. The main controversy centred round the plea of easement. The title to the property was not the subject-matter of controversy. Having regard to the plea and claim so made by the defendants in O.S.No.167 of 1975, the title to the property and possession thereof did not assume any importance. As a matter of fact, it is seen that the parties have proceeded on the basis that the plaintiff in O.S.No.167 of 1975 did have title to the property and possession thereof. Notwithstanding the title to, and possession over, the property it would have been open to the defendants to plead and prove an established easement. It was that they attempted, but failed. The concurrent findings on that aspect are not open to interference in second appeal, the question relating to the title and possession of the property does not arise for examination in the second appeal. The plea has been raised for the first time in second appeal apparently due to counsel's industry here. It may, however, be noted that the defendants in O.S.No.167 of 1975 had specifically admitted that the plaintiff therein had title to, and possession of, the property

which had been recorded in the judgment of the court below. The following is the clear and specific statements as contained in the judgment of the lower appellate court:

> "As the appellants do not dispute the respondent's right to or possession over the plaint property in O.S.No.167 of 1975 the lower court was right in granting an injunction as prayed for in that suit."

In view of the above categoric statement it was not open to counsel here to disown such a crucial statement made on behalf of ~~them~~ his clients in the court below. Even otherwise, as indicated earlier, the entire proceedings will clearly show that the right to, or possession of, the plaint property in O.S. No.167 of 1975, of the plaintiff therein had not been the subject-matter of controversy at all. In view of these circumstances I do not find any substance in the contention raised by counsel for the appellants.

8. These second appeals have been filed after the amendment of the Code of Civil Procedure. Interference is called for only when it is found that the courts below have gone wrong on substantial questions of law. As observed earlier, appreciation of evidence, the application of the legal principles and the conclusions reached by the courts below

appear to be perfectly legal and correct. There is no error, much less any error of law, warranting interference in these second appeals. They are, therefore, dismissed with costs.

C.R.P. No.3360 of 1978.

9. This revision is directed against the order of the court below in E.P.No.209 of 1977 by which it declined to take action under Order 21 Rule 32, C.P.C. by way of arrest and detention of judgment-debtors 1 and 4, for violating the orders of injunction issued in that suit. It was alleged that the judgment-debtors - defendants 1 and 4 - had constructed a 'thodu' along with the northern portion of the plaint property on the night of 7--7--1977 and they were liable to be proceeded for such disobedience of the decree passed by the court.

10. The petition was opposed. They, inter-alia, contended that they had not done any acts as stated in the execution petition. The court below adverted to the evidence of P.Ws.2 and 3 who had given evidence regarding the alleged opening of the 'thodu'. P.W.3 was the plaintiff's own son. His residence was half-a-furlong away from the place.

on intimation about the activity of the 'thodu' he rushed to the spot and noticed about 10 to 30 persons including defendants 1 and 4. He has stated that defendants 1 and 4 were going along with the persons who had so gathered and indulging in the construction activities of the 'thodu'. P.W.3 could give evidence only about the large number of persons numbering about 50 engaging in the construction of the 'thodu' at about 3.30 A.M. on the relevent date. The defendant examined as D.W.1 gave evidence that he had not participated in the construction of the 'thodu'. He appears to be an overseer in the Kerala State Electricity Board. He has produced a certificate to the effect that on 7--7--1977 he was on office duty. Ext.B5 is the certificate. On an appreciation of the evidence the court below felt that there was no reliable evidence to show that defendants 1 and 4 have acted in violation of the decree. In support of its conclusion it referred to the circumstance that P.W.3 had not filed a petition immediately thereafter nor reported to the police. According to the court below, even if it is proved that there was a construction and that the construction of the 'thodu' may benefit the defendants that was not sufficient to uphold that they have actually violated the injunction.

11. The criticism of the evidence of P.W.2 by the court below is not justified. He has given evidence about his having seen defendants 1 and 4 among the large number of persons engaged in the construction activities. The mere fact that he has not chosen to report to the police or omitted to file the petition immediately, is no ground to disbelieve his version. The fact that he could move the court for relief, even without reporting the matter to the police cannot be taken as a circumstance to discredit his testimony. This is particularly having regard to the substantial established fact about the large number of persons engaging in the construction activities. It may be noted that the court below was not concerned with any criminal proceeding but about the action to be taken under Order 21 Rule 32, C.P.C. Of course, the judgment-debtors should have wilfully disobeyed the decree for attracting the action under that provision. If large number of persons had collected together, and if defendants 1 and 4 were among them, having regard to the ordinary course of human nature it would have been a just inference that in the circumstances defendants 1 and 4 were wilfully disobeying the order of the decree of the court. However, even if this court comes to a conclusion

that the court below did not properly evaluate all the circumstances, that may not be a good ground for interfering in the ~~attenuated~~ revisional jurisdiction of this court. There is also the further fact that the 1st defendant had produced Ext.P5 certificate which may, prima facie, justify the ~~[illegible]~~ assumption that he was on duty on 7--7--1977. In these circumstances, if the court below did not feel justified in accepting the evidence of P.Ws.2 and 3, that course, even if it be felt to be not quite correct, is not amenable to correction in revisional jurisdiction. The 1st defendant who is a responsible official of the Electricity Board should have taken extreme pains to see that no occasion arose even for giving a complaint about the violation of the decree of a court of law. It is needless to emphasise the necessity for scrupulous observance of the decrees and orders of the court, for, they who attempt to ignore or violate them, do so at their peril. I need not dilate on this aspect further. I had discussed at some length about the proper approach that should have been taken in a matter like this, so that a court of law should not find itself helpless merely for the reason that there is no conclusive proof beyond a shadow of doubt as in a criminal case. The proof required ~~[illegible]~~ is less rigorous